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Supreme Court of the United States

OCTOBER TERM, 1941.

No. 966.

CHARLES JOBIN,

Appellant,

against

STATE OF ARIZONA,

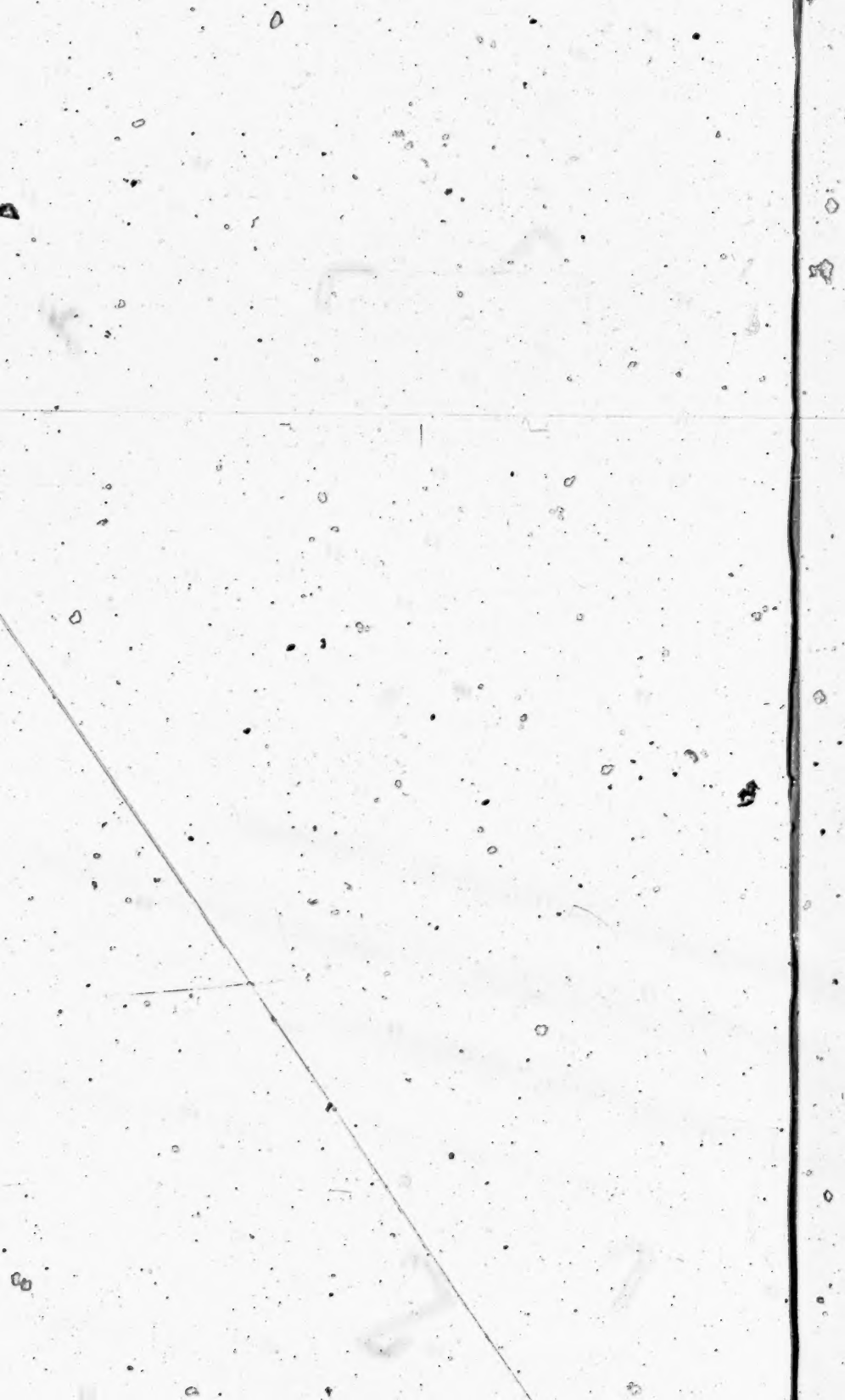
Appellee.

BRIEF ON BEHALF OF AMERICAN CIVIL LIBERTIES UNION AS AMICUS CURIAE.

AMERICAN CIVIL LIBERTIES UNION
as Amicus Curiae.

OSMOND K. FRAENKEL,
Of Counsel.

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OCTOBER TERM, 1941.

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CHARLES JOBIN,

Appellant,

against

STATE OF ARIZONA,

Appellee.

BRIEF ON BEHALF OF AMERICAN CIVIL LIBERTIES UNION AS AMICUS CURIAE.

The American Civil Liberties Union is interested in this case and its companion cases *Jones* v. *Opelika,* No. 280, and *Bowden* v. *Fort Smith,* No. 314, because it believes that they present to this Court certain important constitutional problems with regard to the extent to which restrictions may be imposed upon the dissemination of ideas.

The basic question is whether a municipality, under the guise of collecting license fees for the carrying on of various occupations, may require the taking out of such a license and the payment of a fee by any person who distributes pamphlets containing an expression of opinion for which he asks a contribution or a fixed price.

In the instant case an ordinance of the City of Casa Grande, Arizona, was involved. It exacted a license fee for the carrying on of any "trade, calling, profession or

business". Various businesses were specified in the ordinance (R. 2-8), including peddlers and transient vendors (R. 7). The ordinance was applied to this appellant, a member of the sect of Jehovah's witnesses, who was tried before a jury (R. 9). Some witnesses testified that he was selling literature while going from house to house (R. 16, 21) and that he asked 25¢ for a book which he offered for sale (R. 16), and 10¢ for three pamphlets (R. 21). Another witness said that he was merely asking for a contribution of 25¢ (R. 24). Appellant himself testified that he asked for contributions (R. 33). The jury was instructed that appellant was accused of selling without a license (R. 39) and that no license was required for free distribution (R. 41). The judgment was affirmed on the ground that the ordinance was an ordinary occupational license tax for the purpose of raising revenue (R. 47) and that it covered this case because the literature was being offered for sale (R. 48). Appellant was held to be a peddler and, therefore, within the ordinance (R. 48).

In the companion case, *Bowden* v. *Fort Smith*, No. 314, the stipulation of facts showed that petitioners while going from house to house distributing literature solicited a contribution of 25¢ for each book (R. 12). At the same time one Cole was charged with handing out a leaflet on the streets for which he asked a contribution of 5¢ (R. 12). The two groups of defendants were tried under different ordinances, Cole under an ordinance which required the payment of a license fee for the distribution of handbills (R. 13) and the other defendants for violation of an ordinance which required a license for house to house peddling (R. 14). The conviction of Cole was reversed on the ground that the license was not conditioned upon sale but covered all distribution. Such an ordinance was held void under decisions of this Court (R. 33-34). The conviction of the other two defendants was upheld on the ground that, since the ordinance was limited to sales, a different rule applied (R. 35-36).

A similar question was before this Court in *Jones* v. *Opelika*, No. 280, dismissed, after argument, for lack of a final judgment—application for rehearing now pending. There the ordinance exacted a license for engaging in the occupation of "book agent" (R. 26) and "transient agent" (R. 38). It was applied to an offer of sale of a religious pamphlet on the public streets (R. 39-44). The price requested was five cents for two copies (R. 40).

We believe that the problem raised by these three cases can be resolved into two questions:

1. Is the constitutional protection afforded the distribution of pamphlets dependent upon their distribution without charge?

2. May a municipality restrict the distribution of pamphlets by imposing a license fee?

POINT I.

The constitutional protection afforded the distribution of pamphlets is not dependent upon their distribution without charge.

This Court, in *Lovell* v. *Griffin*, 303 U. S. 444, and *Schneider* v. *Irvington*, 308 U. S. 147, has established the rule that freedom of the press as guaranteed against state action by the due process clause of the Fourteenth Amendment includes distribution of pamphlets, both on the streets and from house to house.

We do not believe that the broad considerations of policy which led this Court so to decide were affected by the question whether or not distribution was free. On the contrary, we believe that the basic consideration which guided this Court was the importance of the distribution

of "information and opinion." For in one of the cases decided under the name of *Schneider* v. *Irvington*, supra, a voluntary contribution was requested by the distributor; this was not considered significant.

That pamphlets of various kinds have in the past played an important part in our history is well established and has been recognized by this Court.[1] Surely this Court did not mean to confine its observations to pamphlets distributed free. For, as was pointed out in *Commonwealth* v. *Reid*, 20 A. 2nd (Pa.) 841, the famous pamphlets of our history were not circulated without charge, but were either distributed to subscribers or were sold on the streets. See also *City of Blue Island* v. *Kozul*, Illinois Supreme Court, not yet reported. Paine's *Commonsense*, for instance, was originally published to be sold at 2 s.; and his *American Crisis* was also not given away, for it produced profits which he dedicated to the service of the American Revolution (see Introduction to Paine's Political Writings, London, 1909, pp. 3, 5).

That pamphlets continue to be of importance in the instruction of the public and the formulation of public policy can hardly be doubted. Indeed, under modern conditions pamphlets are even more essential for such purposes, since it has become increasingly difficult, by reason of technical requirements and expense, to establish newspapers.

No valid reason can exist for making any distinctions between free distribution, as in three of the cases decided under the name of *Schneider* v. *Irvington*, supra, distribution accompanied by solicitation for contributions, as in the fourth *Schneider* case and the *Bowden* case, or distribution, as in the *Jones* case and the case at bar, accompanied by a fixed price demanded for each pamphlet distributed. To make such distinctions would militate against

[1] *Grosjean v. American Press Company*, 297 U. S. 233, 245; *Thornhill v. Alabama*, 310 U. S. 88, 97.

groups desirous of spreading their views who lack financial means; it would facilitate propaganda by the rich and powerful, who are more readily able to use existing means of communication, such as the newspapers and the radio; it would discriminate against those groups in the community least able to make their voices heard through these more conventional media. Surely this Court will not approve laws which have such results.

We believe that in the recent case of *Valentine* v. *Chrestensen* this Court recognized the principle for which we are contending. For in holding that the distribution of "purely commercial advertising" was not protected by the Constitution, Mr. Justice Roberts made a distinction between the pursuit of a "gainful occupation" and the communication of information and opinion. Surely the activities of Jehovah's witnesses in these cases cannot be classified as "gainful occupation."

That distribution of pamphlets should be unrestricted, even though a price be exacted for them, has been widely recognized. The courts have uniformly held that attempts to restrict the sale of printed matter which consisted of expressions of opinion were unconstitutional:

Zimmerman v. *Village of London*, 38 F. Supp. 582;
Reid v. *Borough of Brookville*, 39 F. Supp. 30;
Donley v. *City of Colorado Springs*, 40 F. Supp. 15;
State ex rel. Hough v. *Woodruff*,[2] 2 So. 2nd (Fla.) 577;
Thomas v. *City of Atlanta*,[2] 59 Ga. App. 520;
Village of South Holland v. *Stein*, 373 Ill. 472;
City of Blue Island v. *Kozul*, Ill. Sup. Ct., decided 3/17/42;

[2] In these cases the Court relied rather on the guaranty of religious freedom than on that of freedom of the press.

Herder v. *Shahadi*, 125 N. J. L. 153;
People v. *Banks*, 168 N. Y. Misc. 515;
City of Cincinnati v. *Mosier*, 61 Ohio App. 81;
Commonwealth v. *Reid*, 20 A. 2nd (Pa.) 841;
State v. *Meredith*,[2] 197 S. C. 351;
State v. *Greaves*, 112 Vt. 222;
McConkey v. *City of Fredericksburg*, Va. Sup. Ct., decided 4/13/42.

See also *State ex rel. Semansky* v. *Stark*, 196 La. 307, and *People* v. *Finkelstein*, 170 N. Y. Misc. 188, in which ordinances were construed not to cover the sale of religious or political tracts.

We submit, therefore, that no ordinance prohibiting the sale of pamphlets or giving any official arbitrary power to license such sale would be constitutional. We shall now consider the question whether any different rule should apply because the ordinances in question do not prohibit all sales or give powers of censorship, but accomplish restriction on distribution by exacting a license fee.

POINT II.

A municipality may not restrict the distribution of pamphlets by imposing a license fee.

We believe that the question of the power of the municipality to impose a license fee upon the distribution of matter constituting expression of opinion is not dependent upon whether or not a price is asked for the matter distributed—although the impact of a particular ordinance may depend upon that circumstance.

In each of the cases before this Court the state Court has approved the ordinance as an excise tax upon an occu-

[2] In these cases the Court relied either on the guaranty of religious freedom than on that of freedom of the press.

pation. Thus in the case at bar the Supreme Court of Arizona rested its decision (R. 49) largely upon its own earlier decision in *Giragi* v. *Moore*, 48 Ariz. 33, 49 Ariz. 74, appeal dismissed 301 U. S. 670. But since that case involved a general sales tax, not a license tax, it has no real application here. In the *Bowden* case, the Supreme Court of Arkansas relied chiefly (R. 36) on its earlier decision in *Cook* v. *City of Harrison*, 180 Ark. 546, which, we submit, was incorrectly decided. In the *Jones* case the Alabama Supreme Court thought (R. 6, 7) *Cox* v. *New Hampshire*, 312 U. S. 569, controlling and relied also (R. 7, 8) on *City of Manchester* v. *Leiby*, 117 Fed. 661, cert. den. 313 U. S. 562 and (R. 9) on its own decision in *Ex Parte Stein*, 240 Ala. 324, cert. den., 313 U. S. 562. The *Stein* case is clearly not apposite, since there no question of the distribution of expressions of opinion was involved.

Nor is the *Leiby* case at all pertinent here, since the ordinance there involved was fundamentally different from the ordinances in the three cases now before this Court. For in the *Leiby* case the ordinance did not require the vendor of literature to obtain a license, but only that he get an identification badge. Moreover, it provided that the deposit of 50¢ was to be returned upon the surrender of the badge and that the badge must be immediately issued upon receipt of an application. The language of the Court approving that ordinance must be read in the light of these particular facts. Finally the discussion with regard to the validity of the ordinance was not necessary to the decision, since it might well have rested upon the fact that the constitutional issue was prematurely raised, that being an action to restrain the enforcement of the ordinance. This is made clear from the decision of the same Court in *Hannan* v. *City of Haverhill*, 120 F. 2nd 87, cert. den. 314 U. S. ——. There the Court ruled that it was not necessary to decide a doubtful question with regard to the constitutionality of the ordinance in an action to enjoin the same, citing the *Leiby* case. It held that

the proper way that such question should be raised was by an appeal after conviction in the State Court, particularly since the constitutional question might never arise because of the manner in which the ordinance might be construed by the highest court of the state.

Finally, nothing which this Court decided in the *Cox* case is pertinent here. For in that case this Court was not concerned with the distribution of expressions of opinion, but with the right to use the public streets for the purpose of parade, an entirely different matter. It is one thing to say that a municipality may have the right to require permits for the holding of parades; for these always inconvenience large portions of the public, and it is important that there be no conflict between two parades scheduled for the same time and place. It is quite another thing to say that a municipality may have the right to restrict the distribution of pamphlets constituting expressions of opinion on the public streets merely because a price is asked for the same.

Indeed, the *Cox* case indicates that a result contrary to that reached in the State Court is the proper one. For in that case this Court was careful to point out, in discussing the reasonableness of the license fee charged, that the same was not imposed as a revenue measure but solely to meet the expense incident to the administration of the law and to the maintenance of public order. The implication is clear that a statute imposing a tax upon the holding of a parade would have been held unconstitutional. Surely the distribution of leaflets is even more important to the maintenance of freedom of speech. And again it can make no difference that the ordinance is restricted to distribution for which a price is charged. Since in the case at bar, therefore, there is no contention that the license was exacted for the purpose of defraying police expenses—and there could be no such contention—the ordinance is invalid.

For it cannot be doubted that the enforcement of ordinances of the type here under review would seriously

restrict the dissemination of opinion. In the case at bar the fee required is $25 quarterly per person (R. 7); in the *Bowden* case $25 per month per person (R. 14); in the *Jones* case either $10 per year (R. 26) or $5 per year (R. 38) per person, depending upon which provision of the ordinance was held applicable. It can readily be seen that were any large number of communities to impose license fees of this character the work carried on by Jehovah's witnesses would become impossible. They would either have to abandon any attempt to collect money in connection with the distribution of their literature or pay thousands of dollars a year in license fees. Moreover, it would be possible for communities which disliked their activities to prevent them altogether, either by delaying granting licenses, there being nothing in these ordinances requiring the immediate issuance of a license, or by revoking licenses without notice, which the City Commission is expressly given the right to do in the *Jones* case (R. 22).

The ordinances here under review cannot be sustained, therefore, on the basis of any federal decisions. Nor can they be upheld on the theory that regulation of the use of the streets is involved. For no one of these ordinances in any way restricts any particular use of the streets. There is here no evidence to support any inference that any of the distributors sought to establish himself upon the public streets in any particular place for the purpose of carrying on a business there. In that respect these cases differ entirely from *Comomnwealth* v. *Pascone*, 308 Mass. 591, cert. den. 314 U. S. ——. In that case the Massachusetts Court expressly held that the ordinance was not aimed at persons "simply going about from place to place." That ruling constituted such a construction of the ordinance as to make it clear that what was attempted was the regulation of a business, not a restriction upon the dissemination of opinion. However, in the cases now under consideration none of the State Supreme Courts limited its approval of the ordinances in any similar man-

ner. Nor was there any evidence which would have supported a conviction under an ordinance so restricted.

That an ordinance of the type involved in these cases is not regulatory in any true sense was recognized by the Supreme Court of Vermont in *State* v. *Greaves*, supra. That Court held that the imposition of a license fee was a restraint upon circulation within the *Grosjean* case, supra, as well as within the *Lovell* and other decisions of this Court already cited herein. And in the *Kozul* case, supra, the Supreme Court of Illinois took the same position and held, furthermore, that those decisions of this Court compelled a ruling that a license tax such as this could not be sustained as a revenue measure. Citing *Magnano Co.* v. *Hamilton*, 292 U. S. 40, Chief Justice Murphy pointed out that, by increasing the amount of the tax, circulation could be effectively prohibited.[3] He expressly stated that it made no difference whether the ordinance provided for censorship through licensing, as in the *Lovell* case, or, as here, for a license through taxation: "In either event the effect is that there is an abridgement of the freedom of the press."

The Virginia Supreme Court has just held a similar ordinance void on the ground that the imposition of a license fee under the circumstances disclosed (substantially those of the cases here under consideration) was so burdensome as to amount to a prohibition. (*McConkey* v. *City of Fredericksburg*, not yet reported.) This decision is clearly in accord with the statement of this Court in the *Chrestensen* case, supra, that municipal authorities may not "unduly burden" the dissemination of information and opinion on the streets.

Like results were reached in *Thomas* v. *City of Atlanta*; *People* v. *Banks*; *City of Cincinnati* v. *Mosier* and *Commonwealth* v. *Reid*, supra.

We are just informed that a different result has been reached by the Court of Appeals for the District of Colum-

[3] As already noted, the same result may be achieved by an aggregate of relatively small fees imposed by numerous municipalities.

bia in *Busey* v. *District of Columbia*, decided April 15, 1942, but that a strong dissenting opinion was written by Justice Rutledge, which we believe expresses the better view.

It has been urged that the ordinances can be sustained as revenue measures under the statements of this Court in the *Grosjean* case, supra, and in *Associated Press* v. *National Labor Relations Board*, 301 U. S. 103, 133. Cf. *Arizona Publishing Company* v. *O'Neil*, 22 F. Supp. 117, affirmed per curiam 304 U. S. 543. There can, of course, be no doubt that persons engaged in commercial enterprises, which incidentally involve the distribution of organs of opinion, cannot claim exemption from taxes generally imposed. And the Arizona statute involved in the *O'Neil* case comes within that general category. For there the State imposed a general sales tax on the gross proceeds of business carried on in the state. The tax was not directed at the distribution of opinion.

But the ordinances now before the Court are of an entirely different character. If they be construed as imposing any tax, it is an occupation tax, and, as applied to Jehovah's witnesses, a tax on the sole occupation of distributing leaflets constituting expressions of opinion. It cannot be doubted that had the municipality sought to enforce an ordinance of this type against a person who was freely distributing such leaflets this attempt would have been void. That was recognized by the Arkansas Supreme Court when it reversed the conviction of Cole (No. 314, R. 33, 34). For this Court has held the right to distribute such leaflets to be protected by the Fourteenth Amendment. Any attempt to tax the exercise of such right would, therefore, be a tax on a privilege guaranteed by the United States Constitution and invalid. See *Colgate* v. *Harvey*, 296 U. S. 404[4]; *Crandall* v. *Nevada*, 6 Wall. 35.

We have already pointed out that the circumstance that a price is asked for the leaflet distributed can make no

[4] The overruling of that case in *Madden* v. *Kentucky*, 309 U. S. 83, does not affect the principle here contended for.

difference in the application of the fundamental constitutional principle. We are not dealing here with a commercial enterprise such as was involved in the two Arizona cases, but with persons whose sole occupation it is to spread the truth as they see it, sometimes, as in the *Bowden* case, asking for a contribution, at other times, as in the case at bar and the *Jones* case, asking for a flat price for each leaflet distributed. We do not believe that the statements which this Court has made with regard to the liability of newspapers to pay ordinary taxes were intended to permit the taxation of persons situated as are these members of Jehovah's witnesses.

We submit, therefore, that the convictions in these cases should be reversed and the ordinances held invalid as applied. We believe that this Court should make it clear that the constitutional protection extends to all forms of distribution of opinion and information, that the same cannot be prohibited or taxed, that the circumstance that money is asked, whether directly or otherwise, is entirely immaterial. That will still leave to the states and their municipalities full power to regulate the use of the streets so as to prevent the usurpation of the same, either by a particular individual seeking to establish himself in business at a particular place, as in the *Pascone* case, or by a group of individuals seeking, by the device of a parade, to occupy the whole street, as in the *Cox* case. It will also leave municipalities free to regulate house to house canvassing so as to prevent fraud and annoyance, as was suggested in the *Schneider* case. Whether a municipality can go further and require distributors to obtain some badge of identification upon the making of a nominal deposit for the same, as in the *Leiby* case, need not be decided at this time. Clear it is, however, that to permit municipalities to exact license fees for the distribution or sale of pamphlets would effectively restrict and in many cases make impossible such distribution. And it can make no difference that in a particular case the amount charged may be relatively small.

The effect of upholding ordinances of this kind on the distribution of literature is bound to be catastrophic. No considerations of state public policy require such result. For, as already noted, these ordinances are not really regulatory at all. Here we have, therefore, situations in which this Court should be "astute" to examine the effect of the legislation attacked (see *Schneider* v. *Irvington*, supra). So viewed, the ordinances in this, the *Bowden* and the *Jones* cases, must, as applied to Jehovah's witnesses, be held unconstitutional.

Respectfully submitted,

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